Antony Moses v John D'Silva & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S5)–23–27 OF 1999
KAMALANATHAN RATNAM J
9 FEBRUARY 2001

Civil Procedure *— Res judicata — Decision, finality of earlier decision — No appeal — Issues raised in earlier proceedings — Whether issues raised in present application similar — Whether matter res judicata*

The plaintiff sued the defendants for an alleged wrongful termination of his employment contract and also for libel. The defendants issued a summons for security for costs. The senior assistant registrar ('SAR') dismissed the same with costs and the appeal against the decision of the learned SAR was also dismissed with costs in the cause. The defendants then filed their defence and averred in para 1 thereof that the filing of the defence was without prejudice to their right to apply to strike out the writ. The reply to the defence was also filed and the plaintiff filed a summons for directions as well. A year after entering appearance, the defendants applied to strike out the writ and statement of claim. The learned SAR, having heard the said application, dismissed the same with costs. The defendants appealed against this decision.

Held, dismissing the appeal with costs:

Whilst counsel for the appellants referred the court to various authorities, she failed to address the court on the pivotal issue relating to res judicata. The court noticed that the issues raised in respect of the application to strike out were similar issues already raised by the defendants in their application to obtain security for costs and which application was heard and dismissed by both the learned SAR and the judge. The court also noted that there was no appeal against the court's decision dismissing the appeal in respect of security for costs. The matters were therefore res judicata. The defendants had no right to reagitate the same issues (see p 37E–F).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan-defendan kerana satu dakwaan pemecatan salah kontrak pekerjaan beliau dan juga untuk libel. Defendan-defendan telah mengeluarkan satu saman sebagai jaminan kos. Penolong kanan pendaftar ('PKP') telah menolak saman tersebut dengan kos dan rayuan terhadap keputusan PKP yang arif juga telah ditolak dengan kos mengikut kausa. Defendan-defendan kemudian telah memfailkan pembelaan mereka dan menegaskan dalam perenggan 1 bahawa pemefailan pembelaan tersebut adalah tanpa prejudis terhadap hak mereka untuk memohon membatalkan writ tersebut. Jawapan kepada pembelaan tersebut juga telah difailkan dan

plaintif telah juga memfailkan satu saman arahan. Setelah setahun memasuki kehadiran, defendan-defendan telah memohon untuk membatalkan writ dan tuntutan pernyataan tersebut. PKP yang arif, setelah mendengar permohonan tersebut, telah menolak permohonan dengan kos. Defendan-defendan telah membuat rayuan terhadap keputusan ini.

Diputuskan, menolak rayuan tersebut dengan kos:

Semasa peguam bagi pihak perayu-perayu merujuk kepada mahkamah beberapa autoriti-autoriti, beliau telah gagal untuk mengemukakan kepada mahkamah persoalan yang penting berhubung res judicata. Mahkamah mengambil perhatian bahawa persoalan-persoalan yang ditimbulkan berkaitan permohonan untuk membatalkan tersebut adalah persoalan-persoalan sama yang telah ditimbulkan oleh defendan-defendan di dalam permohonan mereka untuk meperoleh jaminan kos dan permohonan yang mana telah didengar dan ditolak oleh kedua-dua PKP yang arif dan hakim. Mahkamah juga mengambil perhatian bahawa tiada rayuan terhadap keputusan mahkamah yang menolak rayuan tersebut berhubung dengan jaminan kos. Perkara-perkara berikut oleh itu adalah res judicata. Defendan-defendan tidak mempunyai hak untuk meransangkan persoalan-persoalan yang sama (lihat ms 37E–F).]

Notes

For cases on res judicata generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3959–4032.

Legislation referred to

National Language Act s 8
Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d), O 92 r 1

Gurmeet Kaur (*Shafee & Co*) for the appellants/defendants.

R Ledchumiah (*Ramamoorthy Ledchumiah & Co*) for the respondent/plaintiff.

Kamalanathan Ratnam J. : The plaintiff sued the defendants and claimed damages for an alleged wrongful termination of his employment contract with the second defendant and also for libel. Having entered unconditional appearance on 8 April 1999, the defendants issued out a summons for security for costs. The learned senior assistant registrar ('SAR') dismissed the same with costs on 20 October 1999. The appeal to the judge in chambers against the decision of the learned SAR was also dismissed on 20 January 2000 with costs in the cause. The defendants then filed their defence and averred in para 1 thereof that the filing of the defence was without prejudice to their right to apply to strike out the writ under O 18

r 19(1)(a), (b), (c), (d) of the Rules of the High Court 1980 ('the RHC'). The reply to the defence was also filed and the plaintiff, pursuant to my case management also filed the summons for directions. On 23 May 2000, exactly a year after entering appearance, the defendants applied by way of encl 28 to strike out the writ and statement of claim under O 18 r 19(1)(b), (c), (d) of the RHC. The learned SAR, having heard the said application, dismissed the same with costs on 23 September 2000. The defendants appealed against this decision. On 2 November 2000, having only heard the defendants' appeal, I was satisfied that there was no need to hear from the respondent/plaintiff and dismissed the appeal with costs. This is the defendants' appeal against my said decision.

Findings of the court

The defendants' supporting affidavit showed that the application to strike off was in respect of the claim for defamation on the ground that the statement of claim did not show that there was publication of the libel to a third party. The court was specifically referred to para 11 of the statement of claim wherein the plaintiff alleged publication but failed to specify to whom the said publication was made. The defendants also contended that since the alleged defamatory words had not been translated into the national language, there was a breach of s 8 of the National Language Act and O 92 r 1 of the RHC. There were also various allegations of bad pleading and that the statement of claim was vague and meaningless. In respect of the striking out of the claim for wrongful termination, the defendants descended into so much details.

Whilst counsel for the appellants referred me to various authorities, she failed to address me on the pivotal issue relating to res judicata. I notice that the issues raised in respect of the application to strike out were similar issues already raised by the defendants in their application to obtain security for costs and which application was heard and dismissed by both the learned SAR and the judge. I also note that there was no appeal against my decision dismissing the appeal in respect of security for costs. The matters are therefore res judicata. The defendants have no right to reagitate the same issues.

In fact, whilst hearing the appeal in respect of security for costs my notes show that I specifically addressed Ms Gurmeet Kaur with regard to the publication of the impugned letter which was attached to the statement of claim as an exhibit. It is necessary to reproduce the said letter from the second defendant to the plaintiff, which reads as follows:

> Thursday, 7 January 1999
>
> Mr Tony Moses
> Present.
>
> Dear Mr Moses,
>
> *Re: Letter of Termination*
>
> Our intention to employ you in spite of your criminal record was to give you the opportunity to rehabilitate yourself and make yourself useful to your family and the society.

Our efforts during your tenure with us have been proven unsuccessful and we now realize that you have become a liability to the positive image of this company and our caring and forgiving Malaysian society.

We therefore wish to inform you, we do not wish to exercise our option to extend your sponsorship in this country neither do we require your services.

We would be informing the immigration department of our decision and will extend a copy of this letter to them.

We wish you the best of luck.

Thank you.

Yours faithfully,

Sgd
John D'Silva, Managing Director

I also reproduce my notes:

Court to counsel:	Having seen the exhibit attached to the statement of claim, can you tell if whether there is anything in the letter which says that the letter was delivered by hand?
Cik Gurmeet:	Not within the letter.
Court to counsel:	Therefore should the court not hear evidence to determine whether it was actually published as stated by the plaintiff or given only to him personally as stated by you before me.
Cik Gurmeet:	See encl 4 for response.
Court:	Appeal dismissed.
Cik Gurmeet:	I ask for costs in the cause.
Court:	Costs in the cause.

These questions and answers show that there is no evidence that the defendants had personally handed the letter to the plaintiff and that the court had already indicated that at the trial, evidence ought to be adduced to show publication. Since there was no appeal against this decision of mine, I therefore dismissed this appeal with costs.

Appeal dismissed with costs.

Reported by Wong Ee Lynn